IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 16-0716

Elaine Mitchell, and all others similarly situated,

Plaintiffs and Appellants,

-vs-

Glacier County, and State of Montana,

Defendants and Appellees.

On Appeal for the FirstJudicial District Court, Lewis and Clark County
Cause No. ADV 2015-631
Honorable Mike Menahan

APPELLANTS' OPENING BRIEF

Appearances:

Lawrence A. Anderson
Attorney at Law, P.C.
300 4th Street North
P.O. Box 2608
Great Falls, MT 59403-2608
Telephone: 406-727-8466
Facsimile: 406-771-8812
E-mail: laalaw@me.com
Attorney for Appellants

Kirk D. Evenson
Marra, Evenson & Bell, P.C.
P.O. Box 1525
Great Falls, MT 59403-1525
Telephone: 406-268-1000
Facsimile: 406-761-2610
E-mail: kevenson@marralawfirm.com
Attorney for Appellee Glacier County

Gary M. Zadick
James R. Zadick
Ugrin, Alexander, Zadick & Higgins, P.C.
P.O. Box 1746
Great Falls, MT 59403-1746
Telephone: 406-771-0007
Facsimile: 406-452-9360
E-mail: gmz@uazh.com
jrz@uazh.com
Attorneys for Appellee State of Montana

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STATEMENT OF THE ISSUE

WHEN A COUNTY FAILS TO COMPLY WITH AUDITING, BUDGETING AND ACCOUNTING LAWS, AND WHEN THE STATE FAILS TO ENFORCE THOSE LAWS, DOES A PROPERTY TAXPAYER HAVE STANDING TO VINDICATE THOSE LAWS IN COURT?

STATEMENT OF THE CASE

Article VIII, Section 12 of the Montana Constitution charges the legislature to "insure the strict accountability of all revenue received and money spent" by units of government, including counties. The legislature has enacted auditing, budgeting, and accounting laws to implement that mandate.

This case involves flagrant mismanagement of Glacier County's finances. The County's most recent audits show massive and unauthorized deficit spending, pervasive accounting violations, improper investments, and a lack of internal controls. Further audits, required by law, are long overdue, yet the responsible State officers have done nothing to intervene.

Plaintiff Elaine Mitchell owns and pays taxes on real property in Glacier County. She has paid her property taxes under protest. Some 1,120 other taxpayers also have paid taxes under protest due to the County's flagrant mismanagement and violations of law.

Plaintiff filed this case in Lewis & Clark County. She sought only

declaratory and injunctive relief. She brought claims as a Glacier County property taxpayer and on behalf of the putative class of property taxpayers in the County who have paid taxes under protest.

Plaintiff seeks private attorney general status, because a State agency has failed to discharge its duties. She seeks declaratory judgment as to violations of Montana law. She also seeks class certification, and she seeks relief under the Right To Know provisions of the Montana Constitution.

Plaintiff and the putative class seek these specific remedies: (1) a declaration that they can continue to pay taxes under protest until the County demonstrates compliance with its statutory duties; (2) a declaration that the County is in violation of laws which implement the "strict accountability" provision of the Montana Constitution; (3) an order requiring the State to perform its duties under the Single Audit Act by withholding public funds until the County complies with its responsibilities; (4) an order that the State hold accountable the County officials who have failed in their duties, as required by Montana law; (5) an order for the appointment of a receiver, to ensure compliance by the County, as required by Montana law; and (6) a declaration that the County has violated the Right to Know provisions of the State Constitution.

Plaintiff moved for partial summary judgment and class certification. The District Court dismissed all of Plaintiff's claims for lack of standing. From the

judgment of dismissal, the Plaintiff appeals.

STATEMENT OF FACTS

Status of the Plaintiff

Plaintiff Elaine Mitchell owns numerous partials of real property in Glacier County. (Doc. 1, Complaint, ¶ 2; Doc. 41, Mitchell Aff., ¶ 1) Plaintiff is a public accountant; and for a long time, she has been certified by the I.R.S. to provide representation to taxpayers in disputes with the I.R.S.

Plaintiff practices in Glacier County as an accountant and tax preparer. She has engaged in that profession since 1974. For more than 40 years, she has belonged to the Montana Society of Public Accountants, and has served on its board of directors. (Doc. 41, Mitchell Aff., ¶¶ 2-3)

Plaintiff paid her property taxes under protest under the provisions of §15-1-402, MCA, §15-1-404, MCA and §15-1-406(3), MCA.[1] (Mitchell Aff., Ex. 4) She did this because in recent years the County consistently has violated auditing, budgeting, and accounting standards prescribed by Montana law. Those violations were disclosed in the County's last audit, for fiscal years 2013 and 2014.

[1] The provisions of §15-1-404, MCA provide that "The remedies hereby provided shall supercede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded, except in unusual circumstances where the remedies hereby provided are deemed by the court to be inadequate." (emphasis added)

The Glacier County Audit for Fiscal Years 2013 and 2014

Montana's Single Audit Act requires local governments to submit to audits on an annual basis. §2-7-503, MCA. The purpose of the Act is to:

> (a) improve the financial management of local government entities with respect to federal, state, and local financial assistance;
> (b) establish uniform requirements for financial reports and audits of local government entities;
> (c) ensure constituent interests by determining that compliance with all appropriate statutes and regulations is accomplished;
> (d) ensure that the financial condition and operations of the local government entities are reasonably conducted and reported;
> (e) ensure that the stewardship of local government entities is conducted in a manner to preserve and protect the public trust;
> (f) ensure that local government entities accomplish, with economy and efficiency, the duties and responsibilities of the entities in accordance with the legal requirements imposed and the desires of the public; and
> (g) promote the efficient and effective use of audit resources.

§2-7-502(2), MCA (emphasis added).

The audit on which Plaintiff's case is grounded was published in March 2015. It covers the two preceding fiscal years. It was of record in the District Court. (See Doc. 41, Anderson Aff., Ex. 1)

The audit contains numerous significant findings. Examples include:

1. "material weakness(es)" of internal controls over financial reporting; (Id., p. 63)
2. " noncompliance to financial statements;" (p. 63)
3. material weaknesses identified in internal controls of Federal Awards; (p. 63)

4. Numerous fund imbalances and deficiencies:

    a. Ambulance Fund does not keep an accurate general ledger (p. 64);

    b. Capital Assets listed on the books that are not accounted for

    (p. 65);

    c. District Court does not properly account for cash transactions

    (p. 65);

    d. Justice Court does not properly account for cash transactions

    (p. 66);

    e. Clerk & Recorder's office lacks internal controls and has other Deficiencies, including:
        1. Cash accounting
        2. Non segregation of manual journal vouchers
        3. Inadequate internal controls for payroll
        (pp. 68-70)

5. Deficit fund balances due exist in numerous county funds (totaling $752,901 for 2013 and totaling $1,526,925 for 2014). This is a repeat finding. (pp.70-71)

6. Improper reporting of investment assets (p.72);

7. Management fails to discuss and analyze its financial circumstances This is a repeat finding. (p. 72)

8. The County exceeds its budgetary authority for fiscal years 2013 and 2014. This is a repeat finding. (p. 74)

9. The County received a federal Community Block Grant, in which it passed the money to a development entity. It failed to properly monitor this entity or take action pursuant to recommendations of the federal agency making the grant (p. 77)

The auditors pointed out that many of their findings had been identified in prior audits. (See id., pp. 64, 65, 66, 68,70, 72, 74) They cited numerous violations of Montana law, including:

- investments of public money in securities in violation of §7-6-202, MCA (p.25-26);
- delays in deposits of cash in violation of §7-4-2511, MCA (p.68);
- disbursements or expenditures or incurring obligations in excess of the total appropriations for a fund, in violation of §7-6-4005, MCA (p.75);
- maintaining excess reserves of cash in violation of §7-6-4034 (p.75-76);
- maintaining pledged securities in violation of §7-6-207(1), MCA (p.76).

The auditors found no authorization for over-budget expenditures from multiple funds. They pointed out that local government officials are personally liable for excess expenditures, under the provisions of §7-6-4005, MCA (p.75).

Supplemental Reports for 2015

After receiving the 2013-14 audit, the County retained the same firm to evaluate deposits and reporting of the Glacier County Treasurer's office for five months (February 1, 2015 to June 30, 2015). (See Doc. 41, Anderson Aff., Ex. 2) The auditors filed a report citing numerous deficiencies. These included failure to prepare daily cash reports (id., p. 2) and failure to reconcile bank statements (id.).

The most recent County Treasurer's Report extends through November 30,

2015. It shows ongoing fiscal mismanagement continues. Twenty-nine separate County funds had deficit balances, totaling $5,200,696.90. (See Doc. 41, Anderson Aff., Ex. 3)

Thus, the County's most recent Treasurer's Report (itself badly outdated) shows that the deficit has worsened since the last audit catalogued major fiscal mismanagement. The County has not obtained an audit for two years, despite a Montana law requiring audits on an annual basis. See §§2-7-503, 505, MCA.

Additional Violations of Law

Besides its failure to conduct audits, the County is engaged in significant other violations of law. The statutes in question regulate governmental budgeting and accounting.

Section 7-6-612(2)(a), MCA requires each county treasurer to submit a monthly cash report. These cash reports must be submitted by the 20th day of the following month. Glacier County's Treasurer, however, has not submitted a cash report for June 30, 2016. (Doc. 41, Mitchell Aff.)

Sections 7-6-4033 and 4005, MCA require government entities to operate within their budgets. However, as explained above, Glacier County's last cash report shows 29 separate funds operating with deficit balances, totaling well over $5,000,000. (Doc. 41, Anderson Aff., Ex. 3)

Sections 7-6-4001 through 4036, MCA require local government entities to

prepare and operate within an annual budget. Section 7-6-4030(2), MCA, moreover, requires that budgets be balanced. But Glacier County has not prepared and advertised such a budget for years. (Doc. 41, Mitchell Aff.)

Section 7-6-4034(1)(a), MCA requires that after determining the final budget, the governing body shall determine the property tax levy needed to fund it. The governing body must add the total amount of the appropriations and authorized expenditures. Glacier County, however, levies property taxes although no budget has been approved. (Id.)

The State's Failure to Enforce the Laws

The Single Audit Act (SAA) vests the Department of Administration with enforcement authority. § 2-7-504(1), MCA requires the Department

> to establish by rule the general methods and details of accounting for the receipt and disbursement of all money belonging to local government entities and shall establish in those offices general methods and details of accounting … in accordance with generally accepted accounting principles established by the governmental accounting standards board …

(emphasis added)

The SAA requires counties and other local government entities to file audit reports with the Department within six months of the close of each fiscal year. § 2-7-513 and 514(1), MCA. These reports "must comply with the reporting requirements of government auditing standards issued by the U.S. comptroller general and federal regulations adopted by department rule." § 2-7-512, MCA.

When audits disclose deficiencies (as the last Glacier County audit abundantly does), the local government entity must adopt measures to correct them. If deficiencies are not corrected, the Department of Administration "shall withhold financial assistance in accordance with rules adopted by the department." § 2-7-515(3), MCA. In addition to this mandatory withholding, the Department also may assess penalties for violations of the SSA. § 2-7-517, MCA.

Montana law also mandates enforcement action by governmental attorneys. It states that where "violations of law or nonperformance of duty is found on the part of an officer, employee, or board," they "must be proceeded against by the attorney general, or county, city, or town attorney as prescribed by law." § 2-7-515(4), MCA.

Neither the Department, the State's Attorney General, nor the Glacier County Attorney have taken any of the enforcement actions in question. This is so despite the continual violations of law described above, including failures even to file an audit.

Status of The Putative Members of the Class

Besides the named Plaintiff, some 1,120 other Glacier County property taxpayers also have paid their taxes under protest. They have done so to protest the County's mismanagement of its budget and other violations of auditing and budgeting law. (See Doc. 32, Pl. Br. In Support of Motion for Class Certification,

Ex. 1)

The putative class members are these taxpayers who have paid taxes under protest pursuant to §§15-1-402, 404, and 406(3), MCA, or similar provisions. (See Doc. 29, Second Amended Complaint, ¶ 28) The County itself recognizes that there are 435 such property taxpayers. (See Doc. 33, Glacier County Br. In Opp. To Class Certification, p.4)

STANDARD OF REVIEW

Issues of justiciability, such as standing, and political questions present questions of law that this Court reviews de novo. *Chipman v. Northwest Healthcare Corp.,* 2012 MT 242, ¶17, 366 Mont. 450, 288 P.3d 193; *Columbia Falls Elementary School Dist. v. State,* 2005 MT 69, ¶12, 326 Mont. 304, 109 P.3d 257.

SUMMARY OF ARGUMENT

The Montana Constitution's "strict accountability" clause has been implemented through a detailed system of statutes. Violation of those statutes creates justiciable issues. In cases analogous to his case, the Court has found justiciability where citizens challenged violations of statutes implementing constitutional mandates.

Standing is one of the doctrines effecting justiciability. Taxpayer standing is broadly established in this Court's precedents. This Court expressly has

recognized taxpayer standing to challenge governmental misconduct in handling tax revenues. See *Grossman v. State Dept. of Natural Resources,* 209 Mont. 427, 682 P.2d 1319 (1984).

Plaintiff is adversely affected by Glacier County's levy and treatment of tax revenue in the circumstances here. The County's unauthorized deficit spending, accounting defects, and failures to submit to mandatory audits threaten her with increased tax burdens. This Court has recognized that government fiscal misconduct, which increases tax burdens, is economic injury conferring standing on taxpayers. See, e.g., *Helena Parents Com'n v. Lewis and Clark County Comm'rs,* 277 Mont. 367, 372-73, 922 P.2d 1140, 1143 (1996).

Plaintiff thus clearly satisfies the ordinary criteria for standing. Prudential criteria also militate for conferring standing here. Plaintiff's claims incontestably are of great public importance, and because State officers have not enforced the law, the County's violations effectively would be immunized from review if taxpayer standing were not granted.

ARGUMENT

A. Constitutional and Statutory Provisions

Real property in Montana is subject to taxation. §15-6-101, MCA. If property taxes are not timely paid, the county treasurer levies a delinquency assessment and charges interest. §15-16-102, MCA. Ultimately, a lien, a

judgment, and a tax sale will divest a delinquent taxpayer of her property. §§15-16-401 to 504, and §15-17-101 through 214, MCA.

Tax payments, thus, are an obligation of citizenship and of ownership of property, which is rigorously enforced. In exchange, the Montana Constitution imposes a solemn mandate on government: "The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities." Mont. Const., Art. VIII, Sec. 12 (emphasis added).

The "strict accountability" clause embodies a concept of government as a trustee. As this Court explained in *Carbon County v. Draper,* 84 Mont. 413, 276 P. 667 (1929): "Public moneys are but trust funds, and officers but trustees for their administration in the manner, and for the purposes, prescribed by statute."

As a trustee, local government has a fiduciary duty to account for and to properly manage public monies. Id. That is the entire purpose of the auditing, budgeting, and accounting laws at issue here.

To implement "strict accountability" as prescribed by the Constitution, the Legislature has enacted various statutes. Among them are the Montana Local Government Accounting and Budgeting Laws, which include:

(1) Sections 7-6-609 to 611, MCA, which require that governmental entities operate under Generally Accepted Government Accounting Standards

administered by the Department of Administration, §§7-6-609 and 611, MCA. See also §§7-6-612 to 2801, MCA, which prescribe detailed measures for accounting.

(2) The Local Government Budget Act, §§7-6-4001 to 4603, MCA, which regulates the budgeting process, the investment of public funds, the assumption and servicing of public debt, and other matters.

The Legislature also implemented "strict accountability" through the Single Audit Act (SAA), §2-7-501 to 522, MCA. The SAA requires local units of government annually to file audit reports with the Department of Administration. It serves vital purposes, which the Legislature identifies as follows:

> (2) The purposes of this part are to:
> (a) improve the financial management of local government entities with respect to federal, state, and local financial assistance;
> (b) establish uniform requirements for financial reports and audits of local government entities;
> (c) ensure constituent interests by determining that compliance with all appropriate statutes and regulations is accomplished;
> (d) ensure that the financial condition and operations of the local government entities are reasonably conducted and reported;
> (e) ensure that the stewardship of local government entities is conducted in a manner to preserve and protect the public trust;
> (f) ensure that local government entities accomplish, with economy and efficiency, the duties and responsibilities of the entities in accordance with the legal requirements imposed and the desires of the public; and
> (g) promote the efficient and effective use of audit resources.

B. The District Court Decision

The District Court held that Plaintiff lacks standing to vindicate the foregoing statutes. Even though she is a taxpayer paying her taxes under protest,

the Court held that Plaintiff has not alleged a sufficiently concrete injury for standing purposes. (Appellants' Appendix, p. 8 – Order (Doc. 60))

Plaintiff alleged that County residents and taxpayers would "foreseeably be injured by the County's fiscal mismanagement and the State's failure to enforce the auditing, budgeting and accounting laws." (See Doc. 29, Second Amended Complaint, ¶ 28) The District Court held that this allegation was not sufficiently concrete to confer standing. (Appellants' Appendix, p. 9)

The District Court concluded that Plaintiff had failed to allege a concrete injury either to a constitutional or to a statutory right. (Id., p. 10) It determined that neither the Constitution's "strict accountability" clause nor Single Audit Act afford Plaintiff a right relief. (Id.) As will be shown below, the Court misunderstood Plaintiff's claims and misapplied the doctrines of justiciability and standing.

C. The Doctrine of Justiciability

The District Court confused and conflated the various elements of justiciability. This Court has framed the concept of a justiciable controversy as follows:

> First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the

> effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Chipman v. Northwest Healthcare Corp., 2012 MT 242, ¶19, 366 Mont. 450, 288 P.3d 193, cf. *Powder River County v. State,* 2002 MT 259, ¶102, 312 Mont. 198, 60 P.3d 357.

Each of the elements of justiciability exists in the present case. First, Mitchell has an "existing and genuine, as opposed to theoretical, rights or interests." The County in which she lives and pays taxes violates laws designed to insure strict accountability of public revenue. The State has declined to enforce those laws.

Second, this is not an academic or political debate. A Court decision can effectively deal with the controversy by rendering the declaratory and injunctive relief Plaintiff seeks. Third, a judicial decree will have the effect of a final determination of the rights and duties of the parties.

The constitutional clause at issue ("the legislature shall by law insure strict accountability of all revenue") is a directive to the Legislature. It is non-self-executing. As such, had the Legislature failed to act, that failure would constitute a non-justiciable political question. See *Columbia School District v. State,* 2005 MT 69, ¶15, 326 Mont. 304, 109 P.3d 257

However, the Legislature has not failed to act. It has enacted laws to

implement "strict accountability." The construction and enforcement of those laws is clearly justiciable.

A similar question was addressed in *Columbia School District v. State*. The Constitution requires the Legislature to "provide a basic system of free quality public elementary and secondary schools." Once the legislature acted to implement that mandate (resolving the threshold political question), it became incumbent on the courts "to assure that the system enacted by the Legislature enforces, protects, and fulfills the right." *Columbia School District*, ¶¶17-19. Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997) ("[A]lthough [a] provision may be non-self-executing, thus requiring initial legislative action, courts, as final interpreters of the Constitution have the final 'obligation to guard, and protect every right granted or secured by the Constitution'").

Montana's education quality and funding cases provide examples of the foregoing justiciability paradigm. This Court has had no trouble finding justiciable issues once the Legislature implemented the Constitution's provisions. See, e.g., *Helena Elementary School District v. State,* 236 Mont. 44, 55, 769 P.2d 684, 690 (1989) (spending disparities among school districts constituted denial of equality of educational opportunity guaranteed by the Montana Constitution); *Columbia School District v. State,* ¶ 31 (the Legislature has not defined "quality" in laws implementing the constitutional mandate of "free quality … schools," but by any

definition the current system fails to embody that mandate).

The same paradigm applies here. The Constitution's "strict accountability" mandate does not itself give citizens rights that can be vindicated in court. Once the Legislature has implemented that mandate, however, the implementing statutes confer rights, which the courts have an obligation to guard.

The education funding cases provide clear precedent for the justiciability of the issues presented here. The Legislature has acted to implement the constitutional mandate through the SAA and other laws. The courts are empowered to vindicate rights impaired by infringement of those laws.

D. Fundamental Principles of Standing

Standing is one of several justiciability doctrines, which limit Montana courts to deciding only "cases" and "controversies." *Hefferman v. Missoula County,* 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. The question of standing is whether the litigant is entitled to have a court decide the merits of the controversy. Id., ¶ 30.

There are two strands to standing: the case or controversy requirement of the constitution, and the judicially self-imposed prudential limitation. Id., ¶ 31. Under the case and controversy element, there must be a clearly alleged past, present, or threatened injury to a property or civil right, and the injury must be one that would be alleviated by successfully maintaining the action. Id., ¶ 33.

Plaintiff has a right to challenge governmental entities' mismanagement of the public's funds. See *Helena Parents Com'n v. Lewis and Clark County Comm'rs,* 277 Mont. 367, 372-73, 922 P.2d 1140, 1143 (1996). Many Montana cases hold that citizens, taxpayers, and ratepayers can challenge governmental fiscal mismanagement. See e.g. *Milligan v. Miles City,* 51 Mont. 374, 153 P. 276 (1915); *Hill v. Rae,* 52 Mont. 378, 156 P. 826, 827 (1916); *State ex rel. Browning v. Brandjord,* 106 Mont. 395, 81 P.2d 677 (1938); *Butte-Silver Bow Local Government v. State,* 235 Mont. 398, 401, 768 P.2d 327, 329 (1989); *Grossman v. State Dept. of Natural Resources,* 209 Mont. 427, 438-39,682 P.2d 1319, (1984).

Standing to protest the unlawfulness of taxes expressly was recognized in *Grossman*. There, the Court stated:

> We will recognize the standing of a taxpayer, without more, to question the constitutional validity of a tax or use of tax monies where the issue or issues presented directly affect the constitutional validity of the state or its political subdivision action to collect the tax, issue bonds, or use the proceeds thereof.")

209 Mont. at 438-39 (emphasis added). Clearly, *Grossman* applies here.

The District Court rejected the application of *Grossman* to this case. (Appellants' Appendix, p. 12) The Court held that *Grossman* only applies to challenges to the constitutional validity of a tax or use of tax monies. It stated (id.):

> [T]he only constitutional provision at issue is Article VIII, §12, which simply directs the legislature to enact laws to ensure accountability of local government. Mitchell does not argue the legislature failed its constitutional directive, *Grossman* is inapplicable.

The District Court misread *Grossman* and misapplied it to the facts of this case. *Grossman*'s reasoning is not limited strictly to claims that "the legislature failed its constitutional directive." A reasonable reading of *Grossman* extends taxpayer standing to claims of statutory violations as well.

The key language of *Grossman* is its recognition of taxpayer standing to challenge "the use of tax monies … political subdivision action to collect the tax … or use the proceeds thereof." *Grossman*, 209 Mont. at 438-39. Such standing logically should extend to justiciable claims based on statutes as well as on constitutional provisions.

As in *Grossman,* Plaintiff is challenging both the assessment and misuse of tax monies. She argues that the County is assessing property taxes without even having a budget, in violation of §§7-6-4001 to 4036, MCA.

Grossman held that "there is no question that this Court will recognize standing in a taxpayer who is directly adversely affected by a proposed assessment and levy of taxes upon him. 682 P.2d at 1325. It held this despite taking notice that Grossman "is no different than any other citizen, resident, elector, or taxpayer in this state. He alleges no direct adverse impact on him by virtue of the legislative enactment that would not be felt by any other citizen, resident, elector, or taxpayer of the state." Id. at 1324.

Grossman noted expressly that "[t]he rule that a taxpayer must be directly

adversely affected to bring an action contesting the validity of state bonds or the use of tax monies is not as unbendable as our pronouncements in [other sorts of standing cases]." After summarizing various cases, it held:

> From these cases it will be seen that we must add a further exception to the strictures on standing announced in *Chovanak* and *Stewart* above. We will recognize the standing of a taxpayer, without more, to question the state constitutional validity of a tax or use of tax monies where the issue or issues presented directly affect the constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof.

Id. at 1325 (emphasis added).

Grossman thus articulates a policy of relaxing standing requirements in taxpayer cases. The District Court's application of rigorous standing requirements in the present case is directly in conflict with *Grossman.*

Even without the *Grossman* precedent, Plaintiff would have standing to bring her declaratory, injunctive private attorney general claims. Basic standing principles clearly support her right to maintain those claims here. Application of those standing principles is further explained below.

E. Direct Injury to the Plaintiff

Standing requires the complaining party to allege a past, present or threatened injury to property or civil rights, and the injury must be one that would be alleviated by successfully maintaining the action. *Schoof v. Nesbit,* 2014 MT 6,

¶15, 373 Mont. 226, 316 P.3d 831.[2] Standing resolves the issue of whether the litigant is a proper party to seek adjudication of a particular issue.

The injury requirement of standing "is most easily satisfied if a plaintiff alleges either a direct economic injury or alleges that she is confronted with the prospect of criminal prosecution." *Helena Parents Commission*, 922 P.2d at 1143; cf. Eric J. Kuhn, Comment, *Stood Up at the Courthouse Door,* 63 Geo. Wash. L. Rev. 886, 891 (1995) citing *Pennell v. City of San Jose* (1988), 485 U.S. 1, 8, 108 S. CT. 849, 855-56, 99 L. Ed. 2d 1.

This Court takes a broad view of the economic interests that support injury for standing purposes. *Helena Parents Commission* is a precedent very closely on point.

In *Helena Parents Commission*, parents of a school district alleged that the district had mismanaged its investments. The parents suffered an economic injury sufficient to confer standing, because they would incur additional tax burdens. See

[2] The District Court cites *Schoof v. Nesbit,* 2014 MT 6, 373 Mont. 226, 316 P.3d 831 for the proposition that "standing depends on whether the constitutional or statutory provision … can be understood as granting persons in the plaintiff's position a right to judicial relief." (Appellants' Appendix, p. 10) This reading improperly conflates the concept of "private right of action" with standing.

Moreover, if all the legislature had to do to immunize the State from suit was to enact statutes that prohibit suits to enforce them, it could easily render itself unaccountable. This effectively would nullify the Constitution's abrogation of sovereign immunity (in Article II, Section 18).

id., 922 P.2d at 1143.

Helena Parent Commission's analysis applies here. It is foreseeable that Plaintiff will suffer additional property tax burdens because of the County's unauthorized deficit spending, accounting failures, and disregard of audits.

Williamson v. Montana Public Service Com'n., 2012 MT 32, 364 Mont. 128, 272 P.3d 71, is another precedent closely on point. *Williamson* interpreted a statute that gave persons "directly affected" by public utilities' rates and practices the right to challenge them before the Public Services Commission (PSC). The PSC denied standing to homeowners who sought to challenge the power company assessments used to fund a street lighting system.

The challengers at issue in *Williamson* all lived in the lighting district, but paid the power company's lighting assessment through their city property tax bills. The PSC reasoned that the homeowners did not write the checks to the utility, were not its customers, and therefore were not "directly affected" by the rates and practices at issue. Id., ¶ 48.

This Court rejected the PSC's narrow interpretation of the statute's "directly affected" language. It stated:

> We cannot agree that this restrictive construction is consistent with the [statute's] intent. The statute grants standing to "persons", not just "customers," and the critical language is "directly affected", not "directly pays." Under the PSC's approach, large categories of persons could be precluded from pursuing legitimate complaints in the PSC, through the mere expedient of structuring customer classes, rate

> classifications, and billing practices such that customers pay energy fees to an intermediary which in turn pays [the utility] directly ….

Williamson, ¶ 48 (emphasis added).

To demonstrate injury in fact for standing purposes, a person need only show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). *Lujan's* basic standing approach has been adopted in Montana. See *Hefferman*, ¶¶ 32-33.

This Court has held numerous times that standing may rest upon a *threatened* injury. *Chipman v. Northwest Healthcare Corp.,* 2012 MT 242, ¶27, 366 Mont. 450, 288 P.3d 193 (emphasis by the Court). See also *Reichert v. State ex rel. McCulloch,* 2012 MT 111, ¶55, 365 Mont. 92, 278 P.3d 455; *Gryczan v. State,* 283 Mont. 433, 442, 942 P.2d 112, 118 (1997); *Missoula City-County Air Pollution Control Bd. v. Board of Envl. Review,* 282 Mont. 255, 262, 937 P.2d 463, 468 (1997)

A *threatened* injury analytically is no different than the "foreseeable" injury alleged by Plaintiff here. Obviously, because of Montana's balanced budget law, either government services must be cut, or taxpayers must be assessed to make up the deficits.

F. Additional Standing Criteria

In *Helena Parents Commission*, the district court held that the parents failed

to satisfy an additional standing criterion. That criterion is that "the alleged injury must be distinguishable from the injury to the public generally." The district court reasoned that the parents' interest was the same as that of taxpayers generally. See *Helena Parents Commission*, 922 P.2d at 1143.

This Court reversed. It held that "the injury need not be exclusive to the complaining party." Id., citing *Sanders v. Yellowstone County*, 276 Mont. 193, 915 P.2d 196, 198 (1996). See also *Lee v. State,* 195 Mont. 1, 635 P.2d 1282 (1981) (plaintiff who drove on the highways had standing to challenge the constitutionality of a 55-mile- per-hour speed limit proclaimed by the attorney general).

The foregoing precedents apply here. In the present case, the District Court applied an improperly narrow standing paradigm.

This Court also applies "prudential" limitations to standing. These limitations "cannot be defined by hard and fast rules." *Hefferman,* ¶33, see also *Missoula City-County Air Pollution Control Bd. v. Bd. of Envir. Rev.,* 282 Mont. 255, 260, 937 P.2d 463, 466 (1997). The prudential limitations include (1) that a litigant may only assert her own constitutional rights or immunities, *Hefferman,* ¶33, see also *Jones v. Montana U. Sys.,* 2007 MT 82, ¶48, 337 Mont. 1, 155 P.3d 1247; and (2) that the alleged injury must be distinguishable from the injury to the public, though not necessarily exclusive to the plaintiff. *Hefferman* ¶33, see also

Bd. of Trustees v. Cut Bank Pioneer Press, 2007 MT 115, ¶15, 337 Mont. 229, 160 P.3d 482.

The holding in *Lee v. State* particularly merits attention here. In Lee, again, a plaintiff who drove on the highways was granted standing to challenge a speed limit proclaimed by the attorney general. This Court held:

> The statute he attacks operates against him and all drivers in Montana directly. All members of the driving public have an affected interest under the statute attacked, but that does not mean that no member of that driving public can question the constitutional validity of the statute without being arrested for a violation. The acts of the legislature which directly concern large segments of the public, or all the public, are not thereby insulated from judicial attack. Otherwise, the Uniform Declaratory Judgment Act would become largely useless where a plaintiff proposed to test the constitutional validity of a statute directly affecting him. Gary Lee, an automobile driver on Montana highways, has a personal, direct interest for which he can claim judicial protection when one Montana statute grants him a right or privilege to drive under basic safety requirements and another statute permits that right or privilege to be delimited without action of the legislature. Were we to hold otherwise, we would deprive Lee of judicial relief, and let stand the conflict that now exists between two enactments of the legislature. (emphasis added)

Lee, 635 P.2d at 1285 (emphasis added).

As *Lee* warns, the District Court's holding in the present case would render the Declaratory Judgment Act largely useless. It would insulate from judicial scrutiny Glacier County's mismanagement of public funds and the State's failure to enforce the law.

Countervailing factors weigh against "prudential" limitations to standing. The factors include (1) the importance of the question to the public, *Hefferman,*

¶33, see also *Air Pollution Control Bd.,* 937 P.2d at 466; and (2) whether the statute at issue would effectively be immunized from review if the plaintiff were denied standing. *Hefferman,* ¶33, see, e.g., *Gryczan v. State,* 283 Mont. 433, 446, 942 P.2d 112, 120 (1997). Those factors demonstrably apply here.

This case raises issues of great importance concerning the relationship between citizens and their government. If State officials fail to enforce the law, it is crucial that citizens have recourse. This especially is so when the laws in issue implement a constitutional mandate.

As Justice Nelson noted, concurring in *Kloss v. Edward D. Jones & Co.,* 2002 MT 129, ¶58, 310 Mont. 123, 54 P.3d 1, without access to the courts to vindicate constitutional rights, those rights are illusory. This Court should recognize Plaintiff's right to vindicate the constitutional values at issue here.

G. Declaratory Judgment and The Private Attorney General Doctrine

As noted, this case primarily is brought under the Private Attorney General Doctrine and the Declaratory Judgment Act, §27-8-101, MCA. The district court failed to acknowledge these grounds for Plaintiff to prosecute this action.

The Declaratory Judgment Act provides, in pertinent part: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." § 27-8-201, MCA. As *Ridley v. Guaranty National Insurance Co.,* 286 Mont. 325, 331,

951 P.2d 987, 990 (1997), notes:

> The plain language of §27-8-202, MCA, provides that persons whose rights, status, or other legal relations are affected by statute may ask the courts of the state to construe that statute for the purpose of declaring those rights. Section 28-8-201, MCA, makes clear that that right to have statutes construed is not dependent on whether further relief "is or could be claimed."

(emphasis added) Thus, whether or not Plaintiff can seek injunctive relief is a separate issue, independent of the Declaratory Judgment Act

The District Court disregarded the Private Attorney General Doctrine. In *Matter of Dearborn Drainage Area,* 240 Mont. 39, 43, 782 P.2d 898, 900 (1989), the Court recognized that "[t]he Doctrine is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens. "

The significant interest at issue here is the "strict accountability" of local governments for revenues received and spent. The Constitution establishes this interest, and the Legislature has sought to protect it by the passage of laws.

The State's Department of Administration and its Attorney General are responsible to enforce the laws in question. They have chosen not to do so. Thus, the Private Attorney General doctrine manifestly applies.

H. The "Private Right of Action" Paradigm Does Not Apply

The District Court held that the Single Audit Act and the budgeting laws do not afford the Plaintiff a "private right to petition for judicial relief when violations

occur." (Appellants' Appendix, p. 12) This holding improperly conflates federal rules of decision with state rules of decision.

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America,* 511 U.S. 375, 114 S. Ct. 1673 (1994). They have only the power that is authorized by Article III of the Constitution and statutes enacted by Congress pursuant thereto. *Bender v. Williamsport Area School District,* 475 U.S. 534 (1986); cf. *Marbury v. Madison,* 1 Cranch (5 U.S.) 137, 173-180 (1803). Thus, federal courts may not infer that a federal statute creates a private right of action unless Congress has displayed "an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval,* 532 U.S. 275, 286-89 (2001); *Cort v. Ash,* 422 U.S. 66 (1975).

Put another way, federal courts are not general common law courts. See *Wheeldin v. Wheeler,* 373 U.S. 647 (1963). They do not possess the general power to develop substantive common law rules of decision. See *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938).

Justice Stevens aptly summarized this difference between federal and state courts in his concurrence in *O'Melveny & Myers v. F.D.I.C.,* 512 U.S. 79, 90 (1994):

> While I join the Court's opinion, I add this comment to emphasize an important difference between federal courts and state courts. It would be entirely proper for a state court of general jurisdiction to fashion a rule of agency law that would protect creditors of an insolvent

> corporation from the consequences of wrongdoing by corporate officers even if the corporation itself, or its shareholders, would be bound by the acts of its agents. Indeed, a state court might well attach special significance to the fact that the interests of taxpayers as well as ordinary creditors will be affected by the rule at issue in this case. Federal courts, however, "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." [citation omitted] Because state law provides the basis for respondent FDIC's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law.

(emphasis added)

In contrast, Montana courts possess general jurisdiction. Article VII, section 4 of the 1972 Constitution vests district courts with original jurisdiction over "all civil matters and cases at law and in equity… and such additional jurisdiction as may be delegated by the laws of the United States or the state of Montana."

This broad grant of jurisdiction gives our courts "the responsibility to reform common law as justice requires." *Mountain West Bureau Ins. Co. v. Brewer,* 2003 MT 98, ¶22, 315 Mont. 231, 69 P.3d 652; cf. *Pence v. Fox,* 248 Mont. 521, 813 P.2d 429, 431 (1991). The common law therefore is the rule of decision in Montana courts in so far it is not repugnant to the Constitution or statutes. *Herrin v. Sutherland,* 74 Mont. 587, 241 P. 328 (1925); *Aetna Accident & Liability Co. v. Miller,* 54 Mont. 377, 170 P. 760 (1918).

Thus, contrary to the federal paradigm, Montana's rule of decision is that every person who suffers detriment from the unlawful act of another has a remedy.

See § 27-1-202, MCA; *H-D Irrigating, Inc. v. Kimble Properties, Inc.,* 2000 MT 212, 301 Mont. 34, 8 P.3d 95, ¶49. This paradigm has driven Montana's common law tradition since the founding. See, e.g., *Conway v. Monidah Trust*, 47 Mont. 269, 279, 132 P. 26 (1913). Montana's Constitution expresses that paradigm in the first sentence of Article II, Section 16: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character."

As shown above, Plaintiff has suffered an injury through the County's violations of law and the failure of State officers to enforce it. The violations of law are justiciable, and Plaintiff has standing to enforce them. "Private right of action" analysis is out of place, and does not affect the justiciability or standing issues.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's order dismissing Plaintiff's claim. The case should be remanded for further proceedings, including resolution of the pending class certification claim.

Respectfully submitted this 8th day of February 2017.

/s/Lawrence A. Anderson
Lawrence A. Anderson

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of one inch; and that the word count calculated by Microsoft Word does not exceed 6993 words, excluding the Table of Contents, Table of Authority, and Certificate of Compliance.

DATED this 8th day of February 2017.

/s/Lawrence A. Anderson
Lawrence A. Anderson

APPELLANTS' APPENDIX

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